U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

MATTER OF B-I- INC.

DATE: SEPT. 21, 2017

MOTION ON ADMINISTRATIVE APPEALS OFFICE DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, an operator of fitness studios, seeks to employ the Beneficiary as a business analytics director. It requests his classification as a member of the professions holding an advanced degree under the second-preference, immigrant category. *See* Immigration and Nationality Act section 203(b)(2)(A), 8 U.S.C. § 1153(b)(2)(A). This employment-based, "EB-2" category allows U.S. businesses to sponsor foreign nationals for lawful permanent resident status if they have master's degrees, or bachelor's degrees followed by at least five years of experience.

The Director of the Texas Service Center denied the petition, concluding that the Petitioner did not demonstrate its required ability to pay the proffered wage. On appeal, we affirmed the decision. *See Matter of B-I- Inc.*, ID# 457596 (May 5, 2017).

On motion to reconsider, the Petitioner asserts that we erred in requiring evidence of its ability to pay to include copies of annual reports, federal income tax returns, or audited financial statements.

Upon review, we will deny the motion to reconsider.

I. LAW AND ANALYSIS

A motion to reconsider must establish that our decision, based on the record at that time, incorrectly applied law or policy. 8 C.F.R. § 103.5(a)(3). A motion to reconsider must be supported by a pertinent precedent or adopted decision, statutory or regulatory provision, or statement of U.S. Citizenship and Immigration Services (USCIS) or Department of Homeland Security policy.

We dismissed the appeal finding that the Petitioner did not submit regulatory required evidence of its ability to pay the proffered wage. The regulation states that evidence of ability to pay "shall be either in the form of annual reports, federal tax returns, or audited financial statements." 8 C.F.R. § 204.5(g)(2).

On motion, the Petitioner contends that the regulation does not require submission of the specified documentation. Rather, the Petitioner asserts that the materials' submission "is simply encouraged at the discretion of the [adjudicating] officer."

Contrary to the Petitioner's assertion, however, the plain language of 8 C.F.R. § 204.5(g)(2) requires submission of the specified materials. The regulation states that evidence of ability to pay "shall be" in the form of annual reports, federal tax returns, or audited financial statements. 8 C.F.R. § 204.5(g)(2).

In statutes and regulations, the word "shall" ordinarily denotes a mandate. *See Lopez v. Davis*, 531 U.S. 230, 241 (2001) (distinguishing between the use of "permissive may" and "mandatory shall," and noting that "shall" imposes "discretionless obligations"). Consistent with this ordinary meaning, at least one federal court has interpreted 8 C.F.R. § 204.5(g)(2) to require submission of the specified materials. *See Ukrainian Autocephalous Orthodox Church v. Chertoff*, 630 F. Supp. 2d 779, 788 (E.D. Mich. 2009) (finding that a petitioner for a religious worker "did not submit any of the types of evidence *required* by 8 C.F.R. § 204.5(g)(2), *i.e.*, copies of annual reports, federal tax returns, or audited financial statements") (emphasis added).

Citing an internal USCIS memorandum, however, the Petitioner asserts that agency policy does not require submission of annual reports, tax returns, or audited financial statements. *See* Memorandum from William R. Yates, Assoc. Dir. for Ops, USCIS, HQOPRD 90/16.45, "Determination of Ability to Pay under 8 CFR 204.5(g)(2)," (May 4, 2004).

However, the Petitioner misinterprets the Yates Memo. As we found in our appellate decision, the memo requires petitioners to submit the regulatory specified documentation. The memo states: "Required initial evidence, as specified under 8 C.F.R. 204.5(g)(2), includes copies of: (1) annual reports, (2) federal tax returns, or (3) audited financial statements. The petitioner must submit a copy of at least one of these required documents." *Id.* at *2 (emphasis in original).

The Petitioner notes that, if a petition lacks the specified materials, the memo instructs USCIS adjudicators to issue a request for evidence (RFE). *Id.* The Petitioner apparently interprets this instruction to allow other evidence in lieu of the specified materials. As previously discussed, however, the memo emphasizes that a petitioner must submit at least one of the specified materials. *Id.* Therefore, the memo clearly indicates that an RFE must include a request for one of the specified materials. Thus, contrary to the Petitioner's contention, other evidence of ability to pay is insufficient unless accompanied by at least one of the specified materials.

The Petitioner further argues that the instructions to Form I-140, Immigrant Petition for Alien Worker, allow petitioners to demonstrate their abilities to pay without submitting the specified materials. The form states: "You *may* provide evidence [of ability to pay] in the form of copies of annual reports, Federal tax returns, or audited financial statements." USCIS, Form I-140 Instructions, 6, at https://www.uscis.gov/sites/default/files/files/form/i-i140instr.pdf (emphasis added) (last visited Aug. 10, 2017). We acknowledge the incorporation of form instructions into the regulations. *See* 8 C.F.R. § 103.2(a)(1). But the permissive, Form I-140 instructions do not overcome the mandatory, plain language of 8 C.F.R. § 204.5(g)(2). The Petitioner's assertion that it need not submit annual reports, federal tax returns, or audited financial statements to demonstrate its ability to pay is therefore unpersuasive.

The Petitioner has also not demonstrated its ability to pay the proffered wage for additional reasons. In an effort to show that it paid the Beneficiary wages exceeding the proffered wage, the Petitioner submitted copies of payroll records from December 2014 to June 2015. As indicated in our appellate decision, however, initial copies of the records identified the Beneficiary's employer by a name other than the Petitioner's legal name. The Petitioner later submitted copies of payroll records for the same period identifying it as the Beneficiary's employer. Contrary to the instructions in our appellate decision, the Petitioner has not explained the inconsistent records.

The discrepancies in the name of the Beneficiary's employer on the payroll records casts doubt on the Petitioner's claimed payment of wages to him. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988) (requiring a petitioner to resolve inconsistencies of record by independent, objective evidence pointing to where the truth lies). For this additional reason, the Petitioner has not demonstrated its ability to pay the proffered wage.

As also indicated in our appellate decision, USCIS records indicate the Petitioner's filing of a petition for another beneficiary that remained pending after this petition's priority date.[1] A petitioner must demonstrate its ability to pay the proffered wage of each petition it files until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Thus, the Petitioner must establish its ability to pay this Beneficiary as well as the beneficiaries of the other I-140 petitions that were pending or filed after the priority date of the current petition. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (affirming a petition's revocation where the petitioner, as of the filing's approval, did not demonstrate its ability to pay the combined proffered wages of multiple, pending beneficiaries).

Contrary to the instructions in our appellate decision, the Petitioner's motion lacks additional information about its other pending petition. The record does not indicate the proffered wage of the other beneficiary, or whether the Petitioner paid her any wages. The record also does not indicate whether the other beneficiary obtained lawful permanent residence, or whether her petition was denied, withdrawn, or revoked. For this reason, too, the Petitioner has not demonstrated its ability to pay the proffered wage.

II. THE BONA FIDES OF THE JOB OPPORTUNITY

Upon reconsideration, the record also does not establish the availability of the offered position to U.S. workers. A labor certification employer must attest that "[t]he job opportunity has been and is clearly open to any U.S. worker." 20 C.F.R. § 656.10(c)(8). This attestation "infuses the recruitment process with the requirement of a *bona fide* job opportunity: not merely a test of the job market." *Matter of Modular Container Sys., Inc.*, 89-INA-228, 1991 WL 223955, *7 (BALCA 1991) (*en banc*). A relationship between a petitioner and a beneficiary triggering concerns about the

[1] This petition's priority date is December 9, 2014, the date the U.S. Department of Labor accepted the accompanying labor certification application for processing. *See* 8 C.F.R. § 204.5(d) (explaining how to determine a petition's priority date). USCIS records identify the Petitioner's other petition by the receipt number [redacted]

bona fides of a job opportunity "is not only of the blood; it may also be financial, by marriage, or through friendship." *Matter of Sunmart 374*, 2000-INA-93, 2000 WL 707942, *3 (BALCA May 15, 2000). If a petitioner knowingly misrepresented the *bona fides* of a job opportunity, USCIS may invalidate a labor certification after its issuance. *See* 20 C.F.R. § 656.30(d) (authorizing USCIS invalidation upon a finding of "fraud or willful misrepresentation of a material fact involving the labor certification").

Here, public records identify the Beneficiary's residence, as listed on the Form I-140 and the labor certification, as a condominium owned by the Petitioner's chief executive officer (CEO). *See* (Ga.) Bd. of Assessors, at https://www (last visited Aug. 14, 2017). The CEO's ownership of the Beneficiary's home suggests a close personal or business relationship between them, casting doubt on the *bona fides* of the job opportunity.

To determine the *bona fides* of a job opportunity, USCIS must consider numerous factors, including whether a foreign national: is in a position to control or influence hiring decisions regarding an offered position; is related to a business's directors, officers, or employees; incorporated or founded the business; sits on its board of directors; has an ownership interest in it; is involved in its management; is one of a small group of employees; or has qualifications matching specialized or unusual job duties or requirements of an offered position. *Matter of Modular Container*, 1991 WL 223955 at *8. USCIS must also consider whether a foreign national's absence would likely cause a petitioner to cease operations, and whether the employer complied with DOL regulations and recruited for an offered position in good faith. *Id.*

Besides the Beneficiary's residence in a home owned by the Petitioner's CEO, the record indicates that the Beneficiary is one of a small group of employees. The Form I-140 and labor certification state the Petitioner's employment of 26 people. Thus, multiple *Modular Container* factors suggest that the job opportunity is not *bona fide*.

In any future filings in this matter, the Petitioner must submit additional evidence of the availability of the offered position to U.S. workers. Evidence should include copies of its labor certification documentation, including: the notice of filing; the job order; the prevailing wage determination; advertisements of the offered position; the recruitment report; resumes or applications received from U.S. workers; and any correspondence between the company and DOL.

III. CONCLUSION

The motion to reconsider does not establish our incorrect application of law or policy in finding insufficient evidence of the Petitioner's ability to pay the proffered wage. We will therefore affirm our appellate decision.

ORDER: The motion to reconsider is denied.

Cite as *Matter of B-I- Inc.*, ID# 698295 (AAO Sept. 21, 2017)